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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION (a corporation),

Petitioner,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner of the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and FRANK WEIDEMANN,

Respondents.

BRIEF FOR RESPONDENT, FRANK WEIDEMANN, OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT, FRANK WEIDEMANN, OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondent Frank Weidemann respectfully opposes the granting of a writ of certiorari herein, and re-

spectfully submits it should be denied upon the following grounds:

THE CIRCUIT COURT OF APPEALS' DECISION IN THIS CASE IS NOT OF FAR-REACHING EFFECT OR OF GREAT PUBLIC IMPORTANCE.

The order of the Circuit Court of Appeals for the Ninth Circuit denying motion of petitioner to dismiss the appeal of the Deputy Commissioner under the United States Longshoremen's and Harbor Workers' Compensation Act and of Captain Frank Weidemann applies to the facts of this particular case only. It concerns only the instant litigants and even as to petitioner it is of slight importance. To Captain Frank Weidemann alone this decision, involving something less than $3000.00, the amount of his compensation award, of the benefits of which he has been deprived by petitioner for over seven years, is of vital importance. Had the Circuit Court of Appeals for the Ninth Circuit dismissed the appeals in the only words appropriate under the circumstances, namely: *"Dismissed for reliance upon the rules of this court"*, he might well have felt aggrieved and have lost confidence in the justice of courts of law, and he and his family would certainly have suffered a financial loss, serious only by reason of their comparatively limited means.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

This decision denying petitioner's motion to dismiss is based upon the special rule of the Circuit Court of

Appeals for the Ninth Circuit with regard to appeals in admiralty. Until some other Circuit Court shall decide that the Circuit Courts have no power by rule to permit the taking of an appeal by notice without application and allowance of the appeal, there can be no conflict. Certainly the various non-admiralty cases cited by petitioner and one admiralty case where there were express rules of court specifically requiring allowance of the appeal cannot create a conflict with this decision where the rule expressly states no petition or allowance shall be necessary.

ADMIRALTY RULE 1 OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT PERMITTING APPEALS IN THE MANNER TAKEN HERE IS CONTROLLING IN THIS MATTER AND WAS NOT INTENDED TO BE SUPERSEDED BY THE ACT OF FEBRUARY 25, 1925.

The appeals in this case were taken in accordance with Admiralty Rule 1 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, and in conformity with the uniform practice in admiralty appeals in the Ninth Circuit for over thirty years. In unmistakable language it is provided that appeals in admiralty cases shall be taken by the filing and service of a simple notice of appeal. The Rule and its footnote are as follows:

> "An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.

> The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order."

The footnote reads:

> "This rule so far modifies Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules (Kenney v. Louie, No. 939. Motion to dismiss appeal denied May 6, 1903.)"

Petitioner would concede that this Rule was valid and the procedure it provided adequate under the *Act of March 3, 1891* (Ch. 517, sec. 11, 26 Stat. p. 829), but would contend that the Rule was superseded by the *Act of February 13, 1925* (Ch. 229, sec. 8 (c), 43 Stat. p. 940; 28 U. S. C. sec. 230).

Apparently the argument is that the 1891 statute provides that no appeal or writ of error "shall be *taken or sued out* except within six months after the entry of the order, judgment or decree * * *"; whereas, the 1925 statute provides that no writ of error or appeal *"shall be allowed unless application therefor* be duly made within three months after the entry" of the judgment or decree. (Italics ours.)

We think it clear that in passing the 1925 statute Congress had in mind no such technical distinction between "take" on the one hand, and "apply" on the other. Congress was not seeking to alter the *procedure*

but the *time* for appeal—shortening it from six to three months. It was not intended by Congress to deprive the courts of the power to provide in their rules for admiralty appeals as of right by notice.

That Congress did not itself intend by the statute of 1925 to deprive the courts of their power to provide that admiralty appeals might be *taken* (as distinguished from petitioning for an allowance) is shown by the *Act of April 3, 1926* (Ch. 102, 44 Stat. pt. 2, p. 233; 28 U. S. C. sec. 227). This is the statute which provides that appeals may be *taken* from interlocutory as well as from final decrees in admiralty and by its very language shows that Congress understood in 1926 that admiralty appeals might still be *taken* as they had been before 1925. The 1926 statute (italics ours) reads:

> "* * * In all cases where an appeal from a final decree in admiralty to the circuit court of appeals is allowed an appeal may *also be taken* to said court from an interlocutory decree determining the rights and liabilities of the parties; PROVIDED, That the same is *taken* within fifteen days after the entry of the decree; AND PROVIDED FURTHER, That within twenty days after such entry the appellant shall *give notice* of the appeal to the appellee or appellees; but the *taking* of such appeal shall not stay proceedings under the interlocutory decree unless otherwise ordered by the district court upon such terms as shall seem just."

This Act of 1926 recognizes the right to *take* an appeal in an admiralty case by the use of the phrase "an appeal may *also* be taken". The word "also" obviously connotes that an appeal may be taken from

a final decree in admiralty. Congress assumed the right to *take* such an appeal and intended to *extend* that right also to an interlocutory decree in admiralty. For otherwise we have the anomalous situation that a party can appeal from a purely *interlocutory* decree in admiralty of his own volition, but can only appeal from a *final* decree by filing an application to be allowed to do so. This reduces the situation to an absurdity.

By the *Act of January 31, 1928* (Ch. 14, secs. 1, 2, 45 Stat. 54; 28 U. S. C. sec. 861 (a)), Congress abolished writs of error in civil and criminal cases and provided that the relief theretofore obtained by the writ should thereafter be obtainable by appeal.

Recognizing, however, that there were appeals as of right, as distinguished from those new appeals superseding the writs of error in civil and criminal cases and having in mind, no doubt, that, as recognized in its Act of 1926, appeals were *taken,* as they always had been in admiralty, the Congress went on to provide in the 1928 Act that in all cases where an appeal might be taken as of right it should be by service and filing of notice and that "no petition of appeal or allowance of an appeal shall be required".

The text of this provision is as follows:

> "That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part

thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however,* that the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act Jan. 31, 1928, Ch. 14, sec. 2; 45 Stat. 54; 28 U. S. C. sec. 861(a).

The effect of this last provision was that, whereas previously it was left to the Circuit Courts of Appeals to provide by their rules, as the Circuit Court of Appeals had done, that where appeals were a matter of right, as in admiralty, they should be taken by notice without petition, this method was now Congressionally prescribed.

By the *Act of April 26, 1928* (Ch. 440, 45 Stat. p. 466; 28 U. S. C. sec. 861(b)), Section 2 of the Act of January 31, 1928, was amended to provide that the old statutory writ of error procedure should apply to the appeals which the Act of January 31, 1928, substituted for pre-existing writs of error. Section 2 of the Act of January 31, 1928, as thus amended, reads as follows:

"The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

28 U. S. C. sec. 861(b).

This writ of error procedure applies, by the text of the new Section 2, only to appeals which are substituted for the abolished writs of error; that is to say, actions at law.

Territory of Hawaii v. Gay (9 CCA), 52 F. (2d) 356.

The provision of the original Section 2 of the Act of January 31, 1928, for appeal by serving and filing notice in cases where the appeal is of right, was not repeated in the amended section. There was thus no specific statutory procedure for appeals in admiralty and the courts were left free, as they had been before the Act of 1928, to provide for such appeals by notice.

In accordance with its statutory authority to prescribe matters of procedure within its jurisdiction, the Circuit Court of Appeals for the Ninth Circuit on May 21, 1900, adopted Admiralty Rule 1.

The validity of this Rule up to the Act of Congress of February 13, 1925, is not questioned by petitioner. It would claim, however, that the present Admiralty Rule 1 was superseded by the 1925 statute. As a matter of fact, Admiralty Rule 1, as it now stands, was not adopted by this Court until June 27, 1928, effective July 1, 1928. On the former date, this court exercising its rule-making power under the Judicial Code *(Act of March 3, 1911,* sec. 122, 36 Stat. 1132, 28 U. S. C. sec. 219), adopted, "In the Matter of the Amendment and Adoption of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit", the following order:

"IT IS ORDERED that the Rules of Practice of this Court, heretofore adopted, be, and the same are abolished as of June 30, 1928.

IT IS FURTHER ORDERED that the rules, as amended and adopted, this 27th day of June, A. D. 1928, be, and they hereby are declared to be the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit, effective July 1, 1928."

So far as concerns Admiralty Rule 1, the only change from the old form of 1900 is to make provision for appeals from interlocutory as well as from final decrees in admiralty. The old method of appeal by serving and filing notice without petition and allowance continued precisely the same.

At the time of the adoption of its new rule, the Circuit Court for the Ninth Circuit had before it the Act of 1925 on which appellee relies, the Act of 1926 providing that admiralty appeals from interlocutory decrees may "also be taken", and the two Acts of 1928 which we have reviewed above. It must have been evident to the Circuit Court that these various enactments did not alter the situation as it existed before the Act of 1925, namely, that in admiralty cases the appeals were as of right and that the Circuit Court of Appeals might, by rule, provide that they should be taken on notice without petition and allowance. Petitioner would concede that, prior to the enactment of 1925, appeals in admiralty by notice without petition were in order. This was, however, not by virtue of the statute of 1891 itself but by virtue of court rules, even before the statute of 1925 and the subse-

quent enactments to which we have referred, petitions for appeals, as contrasted with notice of appeal, used to be required under the general court rules, but it was recognized that this general practice could be changed by special admiralty rule and it was by virtue of such an admiralty rule, not by statute, that the practice was so changed in the Ninth Circuit. (1 *C. J.* 1348.) It was only for a brief period (between the Act of January 31, 1928, and its amendment by the Act of April 26, 1928) that statute did explicitly prescribe for appeal by serving and filing of notice without petition for appeal or allowance in cases where appeal might be taken as of right.

In other circuits, specifically in the Third (Benedict, 5th ed., secs. 536, 543), where there were no special admiralty rules and the general rules applied, the petition was still required even in admiralty cases. Hence, the decision in *The Ruth,* 20 F. (2d) 314, from the Third Circuit, cited by petitioner, has no bearing on the situation. For, despite the old Act of 1891, permitting the "taking" of appeals, as distinguished from "applying" therefor, petitions for allowance were required under the general rules where there was no admiralty rule to the contrary.

We have been unable to find *any* case holding that the Act of 1925 in any way *changed* the former admiralty practice or that it invalidated former, or inhibited subsequent, admiralty rules and that an appeal might be taken by filing notice thereof. We submit that no such change was in fact made or intended to be made.

The cases cited by petitioner, as sustaining its contention as being in conflict with the instant decision,

Baez v. People of Porto Rico (1st CCA), 82 F. (2d) 317;

Osborn v. United States (4th CCA), 50 F. (2d) 712;

Ross v. White (6th CCA), 32 F. (2d) 750;

United States v. New National Coal & Mining Co. (7th CCA), 72 F. (2d) 168;

Robie v. Hart, Schaffner & Marx (8th CCA), 40 F. (2d) 871;

Share v. United States (8th CCA), 50 F. (2d) 669,

are clearly distinguishable as being, like the *Ruth* case, cases falling under the general rules (where a petition for an appeal is necessary) and not under the admiralty rules (where it is not).

To summarize the situation. No one disputes that under the Act of 1891 the Circuit Courts of Appeals could, by rule, provide for admiralty appeals by notice without petitioning therefor. The contention of petitioner that Congress intended to change this by the Act of 1925 is refuted by the Act of Congress of 1926 which provided that appeals from interlocutory decrees in admiralty might also (that is to say, in addition to appeals from final admiralty decrees) be taken and that the method was by notice. In the Act of January 31, 1928, Congress abolished writs of error and explicitly prescribed (apart from court rule) that where appeals might be taken as of right (as in admiralty) the method was notice without petition or allowance, and the Act of April 26, 1928, dropped this

leaving the courts free, as before, to provide for such appeals by rule and prescribing the writ of error method only for those appeals which took the place of former writs of error.

There was thus one brief period in 1928 when the statutes themselves required appeals, where they lay as of right, as in admiralty cases, to be by notice, and there has been no time since 1891 when the Circuit Courts of Appeals were not free so to provide by rule. The Circuit Court of Appeals for this circuit has always so provided—originally by its Admiralty Rule 1 of May 21, 1900, and afterward by its amended Rule 1 (taking in appeals from interlocutory decrees in admiralty) of June 27, 1928, effective July 1, 1928.

It should be mentioned, finally, that both *Admiralty Rule 49, I. K., of the United States Supreme Court* and *Admiralty Rule 4, 1 (k), of the Circuit Court of Appeals for the Ninth Circuit,* provide that "notice of *or* prayer for an appeal" shall be included in the apostles on appeal, thereby recognizing that the Circuit Courts may provide for admiralty appeals on notice rather than petition.

EVEN IF ALLOWANCE OF AN ADMIRALTY APPEAL IS NECESSARY, THIS WILL BE IMPLIED FROM OTHER ORDERS OF THE DISTRICT COURT, RECOGNIZING THAT AN APPEAL HAS BEEN TAKEN.

Two days before Weidemann's notice of appeal was served and filed, the trial judge ordered the original exhibits in the case transmitted to the Circuit Court of Appeals at the instance of respondent Pillsbury.

From this fact, Weidemann was entitled to presume that the appeal had been allowed, or at least had the District Court's approval.

We do not claim that it was because of this order that appellant Weidemann gave notice of appeal but failed to petition for and secure an order allowing his appeal, as we neither then, nor now, considered such petition or order necessary in an admiralty appeal in the Ninth Circuit. However, had we deemed such procedure necessary or proper, or had it been required, the requirement was dispensed with by the District Court's prior recognition of the merits of the appeal in his order transmitting the exhibits in Pillsbury's appeal, which involved the same question as in Weidemann's appeal.

The only reason for an order allowing an appeal in cases other than admiralty being to afford the court the opportunity to reject or refuse to allow frivolous appeals, it follows that any order which indicates that the court does not consider the appeal unmeritorious dispenses with the necessity for a petition for or order of allowance.

Many orders of the judges, other than a formal order allowing an appeal, are deemed sufficient to indicate the allowance of an appeal. See the following cases, after each of which we point out the nature of the order deemed sufficient to indicate the allowance of an appeal:

Brandies v. Cochrane, 105 U. S. 262; 26 L. ed. 989 (approving bond and signing the citation);

Sage v. Railroad Co., 96 U. S. 712, 24 L. ed. 641 (approving bond or accepting security);

Brown v. McConnell, 124 U. S. 489, 490, 31 L. ed. 495 (the court signing the citation);

In re Fiechtl et al., 107 Fed. 618 (CCA 7th) (approval of appeal bond and order extending time to file record on appeal);

Weinstein v. Black Diamond S. S. Corp., 31 Fed. (2d) 519 (CCA 2nd) (approval of a supersedeas bond);

Louisville Trust Co. v. Stockton, 72 Fed. 1 (CCA 5th) (signing the bill of exceptions and the citation).

See the decision of this court in

Alaska United Gold Min. Co. v. Keating, 116 Fed. 561.

And also

Henderson County N. C. v. Wilkins, 43 Fed. (2d) 670-672 (CCA 4th).

The only case cited by petitioner, to indicate less liberality on the part of the Appellate Courts in construing actions of the trial courts as equivalent to an order allowing an appeal than here contended, is *Ross v. White*, 32 Fed. (2d) 750 (CCA 6th). The only act on the part of the trial court in that case, however, was to attest to the fact that the clerk (who authenticated the transcript of the record) was, at the date of the certificate, clerk of the court, and that his attestation was in due form. This is quite different, in that it does not necessarily imply knowledge on the part of the judge that the particular case is being

appealed, than an act of the court, such as here, in ordering the original exhibits in the case transmitted to the Appellate Court or in making any of the orders or performing any of the acts indicated in the cases above cited. We submit, for example, that had the judge in *Ross v. White,* himself, authenticated the transcript the decision might have been otherwise.

It is respectfully submitted that there is no occasion for the issuance of the writ prayed for, and that it should be denied.

Dated, San Francisco, California,
January 4, 1937.

VICTOR H. PINCKNEY,
Proctor for Respondent,
Frank Weidemann.

RESLEURE, VIVELL & PINCKNEY,
Of Counsel.